UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE KINGATE MANAGEMENT LIMITED LITIGATION	Master File No. 09 Civ. 5386 (DAB)
This Document Relates To: All Actions	**JURY TRIAL DEMANDED**

PLAINTIFFS' OPPOSITION TO DEFENDANT CITI HEDGE'S MOTION TO DISMISS

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Plaintiffs hereby file their response in opposition to the motion to dismiss filed by Citi Hedge Fund Services Ltd. ("Citi Hedge") (DE 97).

PRELIMINARY STATEMENT

Plaintiffs are investors in two Madoff feeder funds, Kingate Global Fund, Ltd. and Kingate Euro Fund, Ltd. (the "Funds"). Citi Hedge served as administrator for the Funds, and assumed responsibility for determining the value of the funds, independently verifying the prices of securities held by the Funds, mailing Fund performance reports to shareholders, communicating with prospective and existing investors and the public, and handling all subscriptions and redemptions for the Funds' shareholders. As a supposedly independent fund administrator, and the self-proclaimed number one fund-of-fund administrator in North America, Citi Hedge was uniquely situated to protect Plaintiffs from Madoff's theft.

Instead, Citi Hedge grossly neglected its duties. Citi Hedge communicated the Funds' supposed value ("NAV") and other information to Plaintiffs in reckless disregard of whether the NAV was supported by reliable information or indeed, any assets at all, and knowing that the information it was providing was contradicted by numerous red flags surrounding Madoff's operations and results. Indeed, Citi Hedge failed in its responsibilities so spectacularly that it did not even report any of the 185 instances in which the securities prices reported by Madoff were demonstrably false according to easily verifiable public records. Each of the Plaintiffs invested on the basis of the false and misleading NAV reported by Citi Hedge, as Citi Hedge knew they would. As a result, Plaintiffs lost their entire investment to the now-infamous Madoff Ponzi scheme.

Citi Hedge is directly responsible for the losses suffered by Plaintiffs in the Madoff Ponzi scheme, yet in its motion to dismiss, it seeks to avoid responsibility for investors' millions in losses. The motion to dismiss should be denied.

FACTUAL BACKGROUND

Citi Hedge and its predecessors in interest (referenced collectively herein as "Citi Hedge") have served as the Funds' administrators since the inception of the Funds. (Amended Consolidated Class Action Complaint ("CAC") ¶ 185.) Citi Hedge has been well-compensated for its services; since 2005 alone, Citi Hedge has received millions of dollars in fees from the Funds. (*Id.* ¶ 192.)

In return for those fees, Citi Hedge assumed duties beyond those of a typical fund administrator. (*Id.* ¶ 196.) Citi Hedge was responsible for determining the net asset value of the Funds' assets each month, and committed to verify the prices of the securities held by the Funds from independent pricing sources. (*Id.* ¶ 187; AA[1] § 4.1.1.) In addition, Citi Hedge was to serve as the Funds' agent with the general public, communicate with shareholders before and after their initial investment, and process all subscription and redemption requests for Fund investors. (CAC ¶ 197; AA §§ 4.4.1, 4.4.4.) Citi Hedge assumed numerous other duties as well. (CAC ¶¶ 191, 196-98; AA §§ 4.2.1, 4.2.8, 4.2.9, 4.3.1, 4.3.3, 4.3.4.)

Citi Hedge knew that Plaintiffs, who communicated directly with Citi Hedge, were relying on Citi Hedge to fulfill its duties, both before and after their initial investment in the Funds. (CAC ¶ 198.) Plaintiffs made all their investment subscriptions directly to Citi Hedge, as well as their redemptions, and received Fund performance reports that contained false NAV

[1] "AA" refers to the two administration agreements: June 1, 2007 Administration Agreement for Kingate Global (CAC Ex. 15, DE 53-16), and June 1, 2007 Administration Agreement for Kingate Euro (July 19, 2010 Declaration of David Y. Licshiz Ex. A, DE 96-2).

statements directly from Citi Hedge. (*Id*. ¶ 197.) Marketing materials that Plaintiffs received before they invested also contained the false NAV statements supplied by Citi Hedge. (CAC ¶ 198; November 4, 2010 Declaration of S. Douglas Bunch ("Bunch Dec.") at Exs. B-J.) Moreover, the Funds' subscription agreements state that the administrator was available to subscribing investors to answer questions about the Information Memorandum, and to "obtain any additional information necessary to verify the information contained in the Information Memorandum." (DE 53-3, Kingate Euro Subscription Agreement ("Euro Sub. Ag.") at S-9; DE 53-2, Kingate Global Subscription Agreement ("Global Sub. Ag.") at S-9 8.)

Citi Hedge utterly failed to fulfill its duties to Plaintiffs. Citi Hedge used manifestly incorrect information from Madoff to calculate the Funds' NAVs, and then provided those fake NAVs to Plaintiffs, with no scrutiny or verification, in the face of numerous red flags and known risks surrounding Madoff's operations. (CAC ¶¶ 202-03, 215-221.) Citi Hedge failed to meet its commitment to verify the securities prices in at least 185 separate instances where the prices were demonstrably false. (*Id*. ¶¶ 77-80, 188.) For example, the October 2003 Madoff account statement reported purchases of more than a million shares of Intel at a price of $27.63 on October 2, 2003, but the price for Intel stock that day never fell below $28.41, so Madoff could not have purchased the shares at the price he claimed. (*Id.* ¶ 78.) In stark contrast to its performance here, Citi Hedge advertises itself as having a "unique competitive advantage, and touts that it provides "industry-leading offshore fund services," and is ranked "the #1 fund administrator." (*Id*. ¶¶ 194-95.) Its reputation lent significant credibility to the Funds and assurance to Plaintiffs. (*Id*. ¶ 198.)

Citi Hedge is registered in Bermuda, but is an affiliate of Citigroup, Inc. and Citi Hedge Fund Services, which is a Delaware corporation registered to do business in New York. (*Id*.

¶ 46.) Citi Hedge conducted significant Fund business in New York, including communicating the Plaintiffs' subscription and redemption requests to Madoff in New York. (*Id*. ¶ 46(c).)

ARGUMENT

The legal standard governing Citi Hedge's motion to dismiss is set forth in Plaintiffs' Consolidated Memorandum of Law in Opposition to the Motions of the Kingate Defendants to Dismiss the Amended Consolidated Class Action Complaint ("Cons. Mem."), at Section I.[2]

I. PLAINTIFFS HAVE STANDING.

Plaintiffs have standing to assert claims against Defendants. *See* Cons. Mem. § I. Numerous cases, addressed in more detail below, have recognized that fund investors hold direct claims against fund service providers like Citi Hedge. *See, e.g., Anwar v. Fairfield Greenwich Ltd.*, No. 09-CV-118, 2010 WL 3341636 (S.D.N.Y. Aug. 18, 2010) ("*Anwar II*"); *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC*, 446 F. Supp. 2d 163 (S.D.N.Y. 2006); *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC*, 592 F. Supp. 2d 608 (S.D.N.Y. 2009).

II. NEITHER SLUSA NOR THE MARTIN ACT BAR PLAINTIFFS' STATE LAW CLAIMS.

Plaintiffs' state-law claims are not barred by SLUSA. *See* Cons. Mem. § IV-A. Plaintiffs' state law claims are also not barred by the Martin Act. *See* Cons. Mem. § IV-B.

III. PLAINTIFFS STATE COMMON LAW TORT CLAIMS

A. Plaintiffs' Common Law Tort Claims Are Governed by New York Law

Citi Hedge contends that Plaintiffs' claims are governed by the law of the British Virgin Islands ("BVI"). Plaintiffs have submitted the Declaration of Anthony George Bompas QC

[2] Plaintiffs incorporate herein by reference all applicable arguments in the Plaintiffs' Consolidated Memorandum of Law in Opposition to the Motions of the Kingate Defendants to Dismiss the Amended Consolidated Class Action Complaint ("Cons. Mem.").

("Bompas Dec."), which explains BVI law as it relates to Plaintiffs' claims, and responds to the Affidavit of Simon Browne-Wilkinson QC ("Wilkinson Dec."). BVI and New York law on Plaintiffs' negligence, negligent misrepresentation, breach of fiduciary duty, and aiding and abetting claims are harmonious, leaving the Court free to apply New York law. *See* Cons. Mem. § II-A. Where there is a difference in the laws of BVI and New York, the law of New York applies as the jurisdiction with the greatest interest in the dispute. *See* Cons. Mem. § II-B. Citi Hedge, an affiliate of New York-headquartered Citigroup, Inc. and Citi Hedge Fund Services, Inc., a Delaware entity authorized to transact business in New York, had significant contacts with New York. (CAC ¶ 46(c).) In its role as the Funds' administrator, Citi Hedge dealt regularly with Madoff in New York for the purpose of receiving information to calculate the Funds' value and processing Plaintiffs' subscription and redemption requests. (*Id*.)

B. Plaintiffs Have Stated Claims for Negligence, Gross Negligence, and Negligent Misrepresentation.

1. Citi Hedge Owed Plaintiffs a Duty of Care Under *Credit Alliance.*

Citi Hedge suggests (at 22) that Plaintiffs' negligence claims should be dismissed under New York law because it owed no duty of care to Plaintiffs. To the contrary, Citi Hedge owed Plaintiffs a duty of care under New York law because Plaintiffs' allegations satisfy the test set forth in *Credit Alliance Corp. v. Arthur Andersen & Co*., 493 N.Y.S.2d 435, 443 (N.Y. 1985). *See, e.g., Anwar II*, 2010 WL 3341636, at *47 (holding that administrator of another BVI Madoff feeder fund owed a duty of care to shareholders); *Pension Committee*, 446 F. Supp. 2d at 199-200 (also recognizing duty of care owed by fund administrator to shareholders); *see also Harmelin v. Man Fin. Inc*., No. 06-1944, 2007 WL 2739579 (E.D. Pa. Sept. 20, 2007) (upholding negligence claim against fund administrator that had failed to properly calculate the NAV by failing to independently verify assets and to ensure that it had access to all of the fund's

trading accounts). *Credit Alliance* requires: "(1) an awareness by the maker of the statement that it is to be used for a particular purpose; (2) reliance by a known party on the statement in furtherance of that purpose; and (3) some conduct by the maker of the statement linking it to the relying party and evincing its understanding of that reliance." *Pension Comm.*, 446 F. Supp. 2d at 199 (*quoting Prudential Ins. Co. v. Dewey, Ballantine, Bushby, Palmer & Wood*, 590 N.Y.S.2d 831, 834-35 (N.Y. 1992)). Citi Hedge does not even address this test.

The first element of the *Credit Alliance* test – awareness by Citi Hedge that its statement was to be used for a particular purpose – is satisfied. Citi Hedge was retained to independently determine the Funds' NAVs and independently verify the securities prices reported by Madoff. (*Id*. ¶ 187.) The number of shares that Plaintiffs received in exchange for their investment depended directly on Citi Hedge's NAV calculations, as did the profits reported to Plaintiffs. (*Id*. ¶ 200.) As recognized in the Funds' information memoranda, "there is very little independent data available to assist a prospective investor in his analysis of the Fund." (DE 53-3, Kingate Euro IM dated Oct. 6, 2008 ("Euro IM") at 7; DE, 53-2, Kingate Global IM dated Oct. 6, 2008 ("Global IM") at 6.) Therefore, Citi Hedge knew that Plaintiffs would rely upon the information it provided for the particular purpose of deciding whether to invest, and it also knew that its involvement in the Funds lent significant credibility to the Funds. (CAC ¶¶ 198-99, 361, 365, 371.) *Anwar II* held that the first element of the *Credit Alliance* test was satisfied based on similar allegations. *Anwar II*, 2010 WL 3341636, at *45. As the court observed in *Pension Committee*, 592 F. Supp. 2d at 641, under these circumstances, it would be "disingenuous" for an administrator like Citi Hedge to contend that it did not know Plaintiffs would rely on the information provided.

The second element – reliance by "a known party" on the statements of Citi Hedge – is satisfied. Plaintiffs allege that they were known to Citi Hedge, both before and after they

invested, because they sent their initial subscription documents and investment assets directly to Citi Hedge. (CAC ¶ 197.) Furthermore, Citi Hedge was required to be available to each prospective subscriber to answer questions about the Funds. (Euro Sub. Ag. at S-9; Global Sub. Ag. at S-9.) Thus, as in *Anwar II*, Plaintiffs' allegations establish that "there was a discrete group of potential investors, not simply a faceless mob, who were known parties to the Administrators, and that the Administrators intended those investors to rely upon the NAV and account balance statements to invest in the Funds." *Anwar II*, 2010 WL 3341636, at *46.[3]

The third element of *Credit Alliance* – some conduct linking Citi Hedge to Plaintiffs – is also satisfied. Citi Hedge was required to, and did, send investment confirmations to Plaintiffs, as well as monthly reports of Fund performance. (CAC ¶¶ 197, 200; Euro IM at 33; Global IM at vii.) In addition, Citi Hedge supplied the false statements of Fund value that were used in marketing materials provided to prospective investors.[4] *See* Bunch Dec. at Exs. B-J. Both *Anwar II*, 2010 WL 3341636, at *47, and *Pension Committee*, 592 F. Supp. 2d at 641, establish that sending NAV statements to interested persons, as Citi Hedge did (CAC ¶¶ 196-97), is sufficient to allege the linking requirement.

Because Plaintiffs' allegations satisfy the test set forth under *Credit Alliance*, Citi Hedge owed Plaintiffs an independent duty of care. It is Citi Hedge's breach of this independent duty of care to Plaintiffs which gives rise to Plaintiffs' negligence and negligent misrepresentation claims. Accordingly, these claims should not be dismissed under New York law.

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[3] *See also Fraternity Fund Ltd. v. Beacon Hill Asset Mgmt. LLC*, 376 F. Supp. 2d 385, 411 (S.D.N.Y. 2005) ("first-time investors" justifiably relied on defendant fund managers and principals "to publish accurate information about the Funds they managed"); *AUSA Life Ins. Co. v. Ernst and Young*, 206 F.3d 202, 223 (2d Cir. 2000) (reversing district court's dismissal of negligent misrepresentation claim where auditors prepared no-default letters which they knew would be for the purpose of being forwarded to note holders, some of which subsequently used the letters to determine whether to make an additional loan).

[4] *See* Cons. Mem. § V-B-5, n. 45 (court may properly consider these marketing materials on a motion to dismiss).

Plaintiffs have also stated a claim for both negligent misrepresentation and negligence under BVI law. (Bompas Dec. ¶¶105-06, 120.2.) Contrary to Citi Hedge's argument (at 21), Madoff's theft is no bar to the claim under BVI law (*id.* ¶ 90); indeed, "it may well be said that the purpose of having an independent party produce NAV and account balance calculations is to prevent fictitious valuations." (*Id.* ¶113.) Nor are the administration agreements are dispositive of Plaintiffs' negligence claims under BVI law. (*Id.* ¶¶ 81, 116.) The agreements actually support Plaintiffs' claims under BVI law, because the provisions that seek to limit the liability of Citi Hedge to "shareholders" further suggest "that there was recognised to be a relevant duty owed by Citi Hedge to the 'Shareholders.'" (*Id.* ¶ 115.) Citi Hedge errs when it suggests (at 22) that its duty of care is limited under BVI law because the administration agreements and information memoranda entitle Citi Hedge to rely on Madoff's data; Citi Hedge inexplicably fails to acknowledge that the agreements actually require Citi Hedge to use an independent pricing service to verify Madoff's data. (CAC ¶¶ 187, 201-03; AA § 4.1.1.)

2. Plaintiffs' Allegations of Recklessness Are Sufficient to State a Gross Negligence Claim.

To survive a motion to dismiss on their gross negligence claims under New York law, Plaintiffs must allege an "extreme departure from the standards of ordinary care." *AMW Materials Testing, Inc. v. Town of Babylon*, 584 F.3d 436, 454 (2d Cir. 2009) (quotation omitted); *Colnaghi, U.S.A., Ltd. v. Jewelers Prot. Servs., Ltd.*, 595 N.Y.S.2d 381, 383 (N.Y. 1993) (gross negligence evinces "a reckless disregard for the rights of others"); *AT&T v. City of New York*, 83 F.3d 549, 556 (2d Cir. 1996) (a "gross failure to exercise due care"). Plaintiffs have adequately made such allegations here.[5]

[5] Citi Hedge contends (at 21) that Plaintiffs' allegations of gross negligence do not meet the "high burden" that is required of them. However, no such heightened pleading burden is in fact required;

Plaintiffs allege that Citi Hedge "grossly failed to exercise due care, and acted in reckless disregard of its duties," failing to "exercise the degree of prudence, caution, and good business practice that would be expected of any reasonable investment professional." (*Id.* ¶ 362.) Plaintiffs allege that "Citi Hedge blindly and recklessly relied on information provided by Madoff to calculate and disseminate the Funds' NAV, and to perform its duties, even though that information was manifestly incorrect and should not have been relied on" (*id.* ¶¶ 201-02), and that "Citi Hedge well knew" that it "should not have relied on the information relied on by Madoff . . . ." (*id.* ¶ 203.) These allegations are well-supported and not simply conclusory. Going well beyond the minimal Rule 8 pleading requirement, Plaintiffs allege specific red flags that Citi Hedge ignored, including consolidation of the roles of investment manager, custodian, and execution agent in Madoff; profits that were impossible to achieve; and 185 instances where Madoff reported demonstrably false prices that Citi Hedge was obligated to verify independently. (*Id.* ¶¶ 77-82, 188, 203, 215-221.) These allegations are more than sufficient to establish gross negligence. *See, e.g., Anwar II*, 2010 WL 3341636 at *49 (finding based on similar allegations that "it is reasonable to infer that the Administrators acted in a way that, if proven, 'differs in kind, not only degree' from ordinary negligent conduct.") (quoting *Colnaghi, U.S.A., Ltd. v. Jewelers Prot. Servs., Ltd.*, 611 N.E.2d 282, 284 (N.Y. 1993)).[6] Accordingly, Plaintiffs' claim for gross negligence should not be dismissed.[7]

"claims for gross negligence, like claims of negligence, are governed by Rule 8(a), not Rule 9(b) of the Federal Rules of Civil Procedure." *Anwar II*, 2010 WL 3341636, at *49. "Plaintiffs are not required to plead gross negligence with particularity, but simply to state a facially-plausible claim, by alleging 'factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Id.* (quoting *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009)).

[6] See also *Court Appointed Receiver of Lancer Offshore, Inc. v. The Citco Group Ltd.*, 2008 WL 926509, at *4, 7 (S.D. Fla. Mar. 31, 2008) (upholding gross negligence claim where plaintiffs alleged that defendants had willfully and recklessly "fail[ed] to use reasonable skill and care to value the Net Asset Values . . . and independently price the Offshore Funds," and had "willingly, knowingly, consciously, and recklessly failed to use reasonable skill and care to be aware of, discover, investigate and report numerous

3. The Exculpatory Provisions in the Administration Agreement Do Not Preclude Plaintiffs' Negligence Claims.

Citi Hedge argues (at 22) that it is absolved from liability for its own negligence because of the exculpatory provision in its administration agreement with the Funds. However, Citi Hedge offers no explanation for why Plaintiffs, who are not parties to this agreement, and who are bringing direct, not derivative claims, would be bound by any exculpatory provision therein. They would not. *Anwar II* flatly rejected a similar argument by fund managers, holding that "[a]t the pleadings stage, this argument carries no water" where plaintiffs were not a party to the agreement. *Anwar II*, 2010 WL 3341636, at *75 n.15.[8] Furthermore, these provisions do not have any bearing on Plaintiffs' allegations of gross negligence. Section 10.3 specifically excludes "gross negligence, willful default or fraud." (AA ¶10.3.) They would otherwise be unenforceable. *See, e.g.*, *Kalisch-Jarcho, Inc. v City of New York*, 58 N.Y.2d 377, 384-85 (N.Y. 1983). Nor are the exculpatory provisions in the agreement dispositive of Plaintiffs' negligence claims under BVI law, as Citi Hedge argues (at 22). If BVI law applied, Plaintiffs' allegations of

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glaring red flags"); *Cromer Fin. Ltd. v. Berger*, 2001 WL 1112548, at *2-3 (S.D.N.Y. Sept. 19, 2001) (upholding gross negligence claim where allegations were that defendant "issued materially false and misleading audit reports" and "knew or recklessly disregarded" that the reports were "the principal means by which investors were induced to purchase shares . . ., to increase their shares . . . and/or to retain their existing shares" and "there was no other purportedly independently-verified information available to investors on which they could rely"); *Cromer Fin. Ltd. v. Berger*, 137 F. Supp. 2d 452, 464 (S.D.N.Y. 2001) (claims of gross negligence against offshore fund administrator sustained).

[7] While BVI law does not have a separate tort of gross negligence, the claim would not be dismissed under BVI law because the allegations of gross negligence are relevant in light of the exculpatory clauses in the administration agreements. (Bompas Dec. ¶ 114.)

[8] *See also Sommer v. Fed. Signal Corp.*, 79 N.Y. 2d 540, 558 (N.Y. 1992) (holding "it would be patently unfair" to deprive a party rights under an exculpatory clause in a contract to which it was not a party); *Miles v. Naval Aviation Museum Found., Inc.*, 289 F.3d 715, 720 (11th Cir. 2002) ("[T]he district court correctly found that the exculpatory contract clause did not affect Plaintiff's claim because he was not a party to the contract."); *Sage Enterprises, Inc. v. Wells Fargo Alarm Services, Inc.*, No. 94-CV-2100 (JG), 1996 WL 1057144 (E.D.N.Y. June 20, 1996) ("No person who owes a duty to avoid ordinary negligence with regard to one party is relieved of that duty because of an agreement made with another party. Sage was not a party to the contract between FMA and Mack and thus is not bound by that contract's exculpatory clause.").

gross negligence by Citi Hedge would likewise be sufficient to avoid the exculpatory provisions. (*Id*. ¶ 114.)

C. Plaintiffs Have Stated Claims for Breach of Fiduciary Duty.

"In New York, the elements of a claim for breach of fiduciary duty are 'breach by a fiduciary of a duty owed to plaintiff; defendant's knowing participation in the breach; and damages.'" *Anwar II*, 2010 WL 3341636, at *29 (quoting *Pension Comm.*, 446 F. Supp. 2d at 195). Citi Hedge disputes that Plaintiffs' allegations establish a fiduciary relationship under New York law. A fiduciary relationship arises when "one party's superior position or superior access to confidential information is so great as to virtually require the other party to repose trust and confidence in the first party." *Anwar II*, 2010 WL 3341636, at *29 (*quoting Pension Comm.*, 446 F. Supp. 2d at 195.). "New York courts generally avoid dismissing a claim of breach of fiduciary duty at the motion to dismiss stage because it usually involves a question of fact: whether someone reposed trust and confidence in another who thereby gain[ed] a resulting superiority or influence." *Musalli Factory for Gold & Jewellry v. JPMorgan Chase Bank, N.A.*, 261 F.R.D. 13, 26 (S.D.N.Y. 2009), *aff'd*, 2010 WL 2588195 (2d Cir. June 29, 2010); *see Anwar II*, 2010 WL 3341636, at *26 ("Whether the [fiduciary] duty exists is a fact-specific inquiry."); *Abercrombie v. Andrew Coll.*, 438 F. Supp. 2d 243, 274 (S.D.N.Y. 2006) (whether a fiduciary duty exists "normally depends on the facts of a particular relationship, [and] therefore a claim alleging the existence of a fiduciary duty is not subject to dismissal"); *EBC I, Inc. v. Goldman Sachs & Co*., 832 N.E.2d 26, 31 (N.Y. 2005) (noting that a fiduciary relationship is "necessarily fact-specific").

Plaintiffs' allegations establish that they had a fiduciary relationship with Citi Hedge. Citi Hedge had superior access to confidential information, because it received information underlying the Funds' values from Madoff, and it was obligated to independently verify the

security prices Madoff reported. (*Id.* ¶ 187; CAC Ex. 15 § 4.1.1.) Citi Hedge's substantial additional duties with regard to the Funds, which go beyond the duties of a typical fund administrator, also gave it superior access to confidential information, including its duties to: provide an employee to act as secretary of the Funds (CAC, Ex. 15, § 4.2.1) and to organize and attend meetings of the Funds' boards of directors (*id.*, § 4.2.7); establish and maintain bank accounts for the Funds (*id.*, § 4.2.9), as well as the Funds' brokerage and custodian accounts (*i.e.*, the Funds' accounts with Madoff) (*id.*, § 4.6.1); maintain the Funds' accounting books (*id.*, §4.3.1) and reconcile accounting issues (*id.*, §4.3.3); prepare draft financial statements for the Funds' auditors (*id.*, §4.3.4); process shareholder subscription and redemption requests (*id.*, § 4.4.1); and answer correspondence from shareholders (*id.*, § 4.4.4). Plaintiffs had to repose trust in Citi Hedge, because Citi Hedge determined the Funds' value as well as the number of shares purchased by Plaintiffs' principal, and was responsible for communicating with them and handling their subscriptions and redemptions. (*Id.* ¶¶ 200.) Of course, Plaintiffs had no access to the significant underlying information available to Citi Hedge, and so could not independently verify any of the information Citi Hedge provided to them – as the information memoranda explicitly recognize. (Euro IM at 7; Global IM at 6.) Plaintiffs had no choice but to repose their trust and confidence in Citi Hedge.

In *Pension Committee*, the court imposed a fiduciary obligation where – as here – the defendants were required to determine the relevant funds' NAVs by reference to "independent pricing sources." *Pension Comm.*, 446 F. Supp. 2d at 197; (CAC ¶¶ 187, 196, 200). In *Anwar II*, 2010 WL 3341636, the court found that the similar "substantial responsibilities" of the fund administrator in that case established a fiduciary relationship, including, *inter alia*, independently calculating the fund's NAV, reconciling the fund's cash and other balances, preparing monthly financial statements, preparing records for the external audit, serving as the Funds' agent with

the general public, and being responsible for communications with investors. *Id.* at *53. *See also EBC I, Inc.*, 832 N.E.2d at 31 (finding a fiduciary relationship because, inter alia, the plaintiff "was induced to and did repose confidence in [the defendant's] knowledge and expertise to advise it as to a fair IPO price").

Citi Hedge contends (at 18) that, because Plaintiffs were clients of a client, the relationship was too attenuated for a fiduciary duty to arise, but this argument overlooks that Plaintiffs have alleged direct contacts between themselves and Citi Hedge. For instance, Citi Hedge was the Funds' "agent with the general public, and was specifically responsible for communications with investors"; it solicited sales and received money and subscription documents directly from Plaintiffs; and it sent investment confirmations, as well as dividends, directly to Plaintiffs. (*Id.* ¶¶ 191, 197.) These allegations of direct contact were sufficient under *Anwar II*, 2010 WL 3341636, * 53 and *Pension Committee*, 446 F. Supp. 2d at 196-97.

The case on which Citi Hedge relies, *Jordan (Berm.) Investment Co. v. Hunter Green Investments LLC*, No. 00 CV 9214, 2007 WL 2948115, at *23 (S.D.N.Y. Oct. 9, 2007), was decided at summary judgment, after discovery revealed that – contrary to Plaintiffs' allegations here – the plaintiff in that case had not relied on the information provided by the fund administrator, and the administrator had simply mailed out fund statements. Indeed, in that case, the claim against the fund administrator was upheld in the earlier ruling on the motion to dismiss and motion for reconsideration. *Jordan (Berm.) Investment Co. v. Hunter Green Investments Ltd.*, No. 00 CIV 9214(RWS), 2003 WL 1751780, at *13 (S.D.N.Y. Apr. 1, 2003); *Jordan*

(Berm.) Investment Co. v. Hunter Green Investments Ltd., No. 00 CIV 9214(RWS), 2003 WL 21263544, at *4 (S.D.N.Y. June 2, 2003).[9]

Citi Hedge further contends (at 18-19) that it did not voluntarily accept a fiduciary role vis-à-vis the Funds' investors. This after-the-fact disclaimer cannot undo the fiduciary nature of the relationship. Plaintiffs allege that, throughout the relationship, Citi Hedge allowed its name and duties to be set forth in the information memoranda for prospective investors; allowed its NAV calculations to be set forth in marketing materials provided to prospective investors; knowingly accepted investment monies directly from Plaintiffs; sent investment confirmations directly to Plaintiffs; continued to calculate the NAV on which it knew Plaintiffs relied to ascertain account values; and communicated regularly with Plaintiffs as investors – all without ever disclaiming the fiduciary nature of the relationship. (CAC ¶¶ 185, 187, 189-92, 200; Bunch Dec. at Exs. B-J.) *See Anwar II*, 2010 WL 3341636, at *53 (rejecting a similar argument by the fund administrator, observing that the administrator's relationship with plaintiffs included "communicating with them before investing in the form of Placement Memos that featured, with permission from the Citco Defendants, their names, duties, and NAV calculations," and that the administrator "accepted money from Plaintiffs, sent investment confirmations to Plaintiffs, and calculated the NAV on which Plaintiffs relied.").[10]

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[9] The other case cited by Citi Hedge, *Thermal Imaging, Inc. v. Sandgrain Securities, Inc.*, 158 F. Supp. 2d 335, 343 (S.D.N.Y. 2001), was also decided at summary judgment, and discovery had revealed far less contact and reliance than is alleged here.

[10] The cases cited by Citi Hedge (at 19, n10) are distinguishable, because in those cases, the plaintiff were not virtually required to repose trust in the defendants – as Plaintiffs were here –but simply chose to do so. *See Musalli Factory for Gold & Jewellry v. JPMorgan Chase Bank, N.A.*, 261 F.R.D. 13, 26 (S.D.N.Y. 2009) (applying general rule that banks do not owe fiduciary duties in a deposit or lending relationship), *aff'd*, 2010 WL 2588195 (2d Cir. June 29, 2010); *DeBlasio v. Merrill Lynch & Co.*, No. 07-CV-318, 2009 WL 2242605, at *28 (S.D.N.Y. July 27, 2009) (dismissing claim because plaintiffs alleged no "interactions-indirect or otherwise" between plaintiffs and defendants); *Kolbeck v. LIT Am., Inc.*, 923 F. Supp. 557, 561-62, 572 (S.D.N.Y. 1996) (dismissing a fiduciary duty claim because the claim was premised on unspecified statements made by people other than the defendant).

Citi Hedge endeavors to distinguish the cases holding that a fund administrator owes a fiduciary duty to fund investors by arguing (at 19) that courts only allow such claims where the administrator undertook to implement trades on behalf of the fund or held itself out to fund investors as having specific policies and procedures to fairly value illiquid fund assets. But nowhere do the cases define the fiduciary relationship so narrowly. While *Anwar II* also mentioned that the defendants "advertised that they were a reliable fiduciary," the court went on to emphasize that its holding that plaintiffs had adequately alleged a fiduciary duty was not "based only on the [defendants'] marketing materials." *Anwar II*, 2010 WL 3341636, at *53. In any event, like the administrator in *Anwar II*, Citi Hedge held itself out as an "elite professional" (*Anwar II*, 2010 WL 3341636, at *53), touting on its website that it had "the experience, the global scale and the state-of-the-art technology to meet the comprehensive and complex needs of hedge funds and their managers for years to come"; that it was "ranked the #1 fund administrator"; and that it had a "unique competitive advantage" over other fund service providers. (CAC ¶¶ 194-95.) Thus, even if marketing statements were required, Plaintiffs' allegations are sufficient.[11] Accordingly, accepting Plaintiffs' allegations as true, Plaintiffs have established a fiduciary duty between them and Citi Hedge as fund administrator.

Citi Hedge further contends (at 20) that, even if it was a fiduciary of Plaintiffs, it did not breach its duty. But Plaintiffs' allegation that Citi Hedge communicated fictitious Fund values to Plaintiffs before and after they invested, while ignoring red flags that showed the falsity of those figures and profoundly neglecting its obligations as the Funds' administrator, establish breach.

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[11] Citi Hedge argues (at 19, n11) that Plaintiffs may not rely on statements from its website because Plaintiffs cannot allege these statements were on the website of it or its predecessors when Plaintiffs invested in the Funds, or that they relied on them. *Anwar II* properly rejected this same argument, observing: "These are the kinds of factual disputes that are inappropriate for the Court to resolve at this stage, where the Court is obligated to accept Plaintiffs' allegations as true and resolve doubts and draw all reasonable inferences in their favor." *Anwar II*, 2010 WL 3341636, at *60.

(CAC ¶¶ 201-03, 215-21, 356.) Remarkably, Citi Hedge suggests (at 20) that, even if it had discovered the at least 185 separate instances where Madoff incorrectly reported the prices of securities he was falsely claiming to hold – a key breach alleged by Plaintiffs (¶¶ 77-80, 188) – it would have appeared to be an "administrative error." Yet it is precisely this alarming lack of scrutiny in the face of manifestly incorrect information and inappropriate tolerance of red flags suggesting a high risk of fraud that Plaintiffs contend breached the fiduciary duty. Citi Hedge, as the party tasked with independently verifying the prices of the securities Madoff purported to hold, was uniquely well-situated to investigate these pricing discrepancies – indeed, keeping track of the prices was its key responsibility. Citi Hedge agreed to and was paid to undertake this task to protect Plaintiffs, yet failed to do so.[12] As such, Citi Hedge's conduct was a substantial factor in causing Plaintiffs' loss, and Plaintiffs' allegations establish breach. *See RSL Commc'ns PLC ex rel. Jervis v. Bildirici*, No. 04-CV-5217, 2006 WL 2689869, at *5 (S.D.N.Y. Sept. 14, 2006) ("To establish that [d]efendants breached their duty of care, [p]laintiff need only 'establish that the offending parties' actions were a substantial factor in causing an identifiable loss.'") (internal quotation marks omitted) (*quoting F.D.I.C. v. Bober*, No. 95-CV-9529, 2003 WL 21976410, at *1 (S.D.N.Y. Aug. 19, 2003)); *Gibbs v. Breed, Abbot & Morgan*, 710 N.Y.S.2d 578, 684 (App. Div. 1st Dep't 2000) (requiring that "the offending parties' actions were a substantial factor in causing an identifiable loss" to establish breach (internal quotation marks omitted)).

[12] Citi Hedge also inexplicably argues (at 20) that it did not undertake to verify the security prices reported by Madoff – even though the Information Memoranda provided to investors indicated that this was the administrator's responsibility (CAC ¶ 187), and the administration agreement confirms that Citi Hedge was to use "independent pricing services" when calculating the net asset value. (AA § 4.1.1.) Citi Hedge's unsupported assertion that it did not, in fact, undertake this duty creates, at most, a factual dispute that cannot be resolved before discovery.

The result is the same under BVI law. (Bompas Dec. ¶ 143.) Citi Hedge contends (at 17) that Plaintiffs' claims for breach of fiduciary duty fail under BVI law because Plaintiffs do not identify any statement by Citi Hedge evidencing an intent to voluntarily accept a fiduciary obligation. However, nowhere in the Wilkinson Affidavit submitted by Citi Hedge is it suggested that under BVI law the fiduciary must accept the duty through an express statement. Rather, Wilkinson acknowledges that if the circumstances give rise to a relationship of trust and confidence – as Plaintiffs allege – a fiduciary obligation arises. (Wilkinson Dec., ¶ 19.) Furthermore, contrary to Citi Hedge's argument (at 18), Plaintiffs' allegations go beyond simple incompetence, and suffice to establish breach of fiduciary duty under BVI law. (Bompas Dec., ¶¶ 143.3.)

D. Plaintiffs Have Stated Claims for Aiding and Abetting Fraud and Aiding and Abetting Breach of Fiduciary Duty.

To state a claim for aiding and abetting a breach of fiduciary duty, a plaintiff must show: "(1) breach of fiduciary obligations to another of which the aider and abettor had actual knowledge; (2) the defendant knowingly induced or participated in the breach; and (3) plaintiff suffered actual damages as a result of the breach." *Kottler v. Deutsche Bank AG*, 607 F. Supp. 2d 447, 466 (S.D.N.Y. 2009); *Anwar II*, 2010 WL 3341636, at *54. Similarly, to state a claim for aiding and abetting fraud, a plaintiff must show: "(1) the existence of an underlying fraud; (2) knowledge of this fraud on the part of the aider and abettor; and (3) substantial assistance by the aider and abettor in achievement of the fraud." *Kottler*, 607 F. Supp. 2d at 464; *Anwar II*, 2010 WL 3341636, at *54. [13] Citi Hedge disputes (at 23-24) only the knowledge element – whether

[13] Plaintiffs' claim for aiding and abetting breach of fiduciary duty claim is governed by Rule 8 pleading standard, *Musalli Factory for Gold & Jewellry v. JPMorgan Chase Bank, N.A*, 261 F.R.D. 13, 23-24 (S.D.N.Y. 2009), while Plaintiffs' claim for aiding and abetting fraud is governed by Rule 9.

the allegations sufficiently establish Citi Hedge's actual knowledge of the breach of fiduciary duty or fraud by the Kingate Defendants.

Citi Hedge is incorrect when it asserts (at 23) that willful blindness is insufficient to satisfy the knowledge requirement. It is well-established that allegations that create "a strong inference of actual knowledge or conscious avoidance" are sufficient to satisfy the actual knowledge requirement. *Anwar II*, 2010 WL 3341636, at *54; *see also Fraternity Fund Ltd. v. Beacon Hill Asset Mgmt., LLC*, 479 F. Supp. 2d 349, 370 (S.D.N.Y. 2007) ("[T]he Court sees no reason to spare a putative aider and abettor who consciously avoids confirming facts that, if known, would demonstrate the fraudulent nature of the endeavor he or she substantially furthers."); *Cromer Fin. Ltd. v. Berger*, No. 00-CV-2284, 2003 WL 21436164, at *9 (S.D.N.Y. June 23, 2003) (denying summary judgment on an aiding and abetting breach of fiduciary duty claim because plaintiff "rais[ed] questions of fact as to whether [defendant] consciously avoided confirming the existence of the . . . breach of fiduciary duty"). Actual knowledge can be "discerned from the surrounding circumstances." *Oster v. Kirschner*, 905 N.Y.S.2d 69, 72 (App. Div. 1st Dep't. 2010). The knowledge requirement is not identical to the scienter required for the underlying fraud. *See Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 652 F. Supp. 2d 495, 502-03 (S.D.N.Y. 2009); *Anwar II*, 2010 WL 3341636, at *54.

Plaintiffs' allegations satisfy the actual knowledge requirement. Citi Hedge's longstanding and extensive involvement with the Funds and its managers creates a strong inference of Citi Hedge's actual knowledge of the breach of fiduciary duty and fraud being perpetrated by the Kingate Defendants on Plaintiffs set forth in Counts 1, 2, 7, and 8. Specifically, Citi Hedge and its predecessors in interest served as administrators of the Funds from their inception. (CAC ¶ 185.) In that role, Citi Hedge was highly involved in the Funds' affairs, maintaining the Funds' books and records, providing an employee to serve as secretary

for the Funds, preparing draft financial statements for the Funds' auditors, and reconciling the Funds' accounting issues. (*Id.* ¶ 196.) Citi Hedge's employee was even obligated to organize and attend meetings of the Funds' boards of directors. (AA § 4.2.7.) Citi Hedge also served as the Funds' agent with the general public, and processed all subscription and redemption requests for the Funds' investors. (*Id.* ¶ 197; AA §§ 4.4.1, 4.4.4.) Citi Hedge was knowledgeable about proper Fund administration, having extensive experience in providing financial services to funds. (*id.* ¶¶ 193-95). Furthermore, Citi Hedge was aware of the roles consolidated in Madoff and other red flags, which demanded a higher level of scrutiny over the Madoff investments.[14] (*Id.* ¶¶ 77-82, 203, 215-22). These allegations create a strong inference that Citi Hedge knew, as Plaintiffs allege it did, that the Kingate Defendants were committing fraud and breach of fiduciary duty by, for instance, making false representations to Plaintiffs about the extent of their due diligence and oversight over the Funds' investments and the nature of the Madoff investments, that the Kingate Defendants had absolutely no adequate system in place to monitor the Funds' investments in Madoff, and that they were failing to perform necessary and adequate due diligence. (*Id.* ¶¶ 383, 389.) Under these circumstances, if Citi Hedge did not know of the fraud and breach of fiduciary duty being perpetrated, it was only because it "refrained from confirming [them] in order later to be able to deny knowledge." *Fraternity Fund*, 479 F. Supp. 2d at 368 (internal quotation marks omitted). The knowledge requirement is satisfied.

Similar facts have been found sufficient to demonstrate actual knowledge in other cases. *See, e.g.*, *Anwar II*, 2010 WL 3341636, at *55 (relying on the defendants' "aware[ness] of the

[14] The red flags of which Citi Hedge was aware include: Madoff failed to trade through an independent broker; self-cleared all trading activities; and served as his own custodian. (CAC ¶ 215.) He refused to identify the counterparties with which he supposedly traded, (*id.* ¶ 216), used an unknown accounting firm which publicly represented that it did not conduct audits, (*id.* ¶ 218), reported his trades on paper despite claiming to be technologically advanced, (*id.* ¶ 219), and had preternaturally consistent results, (*id.* ¶ 220).

roles consolidated in Madoff," and other red flags, together with the defendants' "familiarity with the [f]unds, as well as their general experience in providing financial services to funds" in concluding that "[p]laintiffs allege a strong inference that the [defendants] consciously avoided confirming facts that, if known, would demonstrate" both a breach of fiduciary duty and fraud) (internal quotation marks omitted); *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC*, No. 05 Civ. 9016(SAS), 2007 WL 528703, at *7 (S.D.N.Y., Feb. 20, 2007) (holding "actual knowledge" requirement satisfied where there was "circumstantial evidence" giving rise to an "inference of knowledge," such as the series of "red flags" that the administrator allegedly ignored); *Cromer Fin.*, 2003 WL 21436164, at *1, 9 (finding a material dispute of fact when plaintiffs argued that the defendant auditing firm "ignored evidence of [defendant's] fraud and failed their responsibilities as auditors"); *Houbigant, Inc. v. Deloitte & Touche LLP*, 753 N.Y.S.2d 493, 498, 500 (App. Div. 1st Dep't 2003) (noting that cases had imposed fraud liability on accountants where the accountant "recklessly failed to independently verify and investigate the documents of a corporation it knew had severe internal control and reporting problems," and imposing liability for aiding and abetting fraud "based on audit reports and financial statements that allegedly did not accurately reflect the financial condition of [the defendant's] clients" (internal quotation marks and emphasis omitted)); *Oster*, 905 N.Y.S.2d at 72 (finding that knowledge of misrepresentations as to dates, and criminal background of the people running an investment vehicle, was sufficient to demonstrate actual knowledge that the investment vehicle was a Ponzi scheme); *ADL, LLC v. Tirakian*, No. CV 2006-5076, 2010 WL 3925131, at *17 (E.D.N.Y. August 26, 2010) (relying, in part, on defendants' "extensive experience" of financial and business practices in order to infer actual knowledge). As in these decisions, Plaintiffs here have alleged both actual knowledge and circumstances from which such knowledge can be inferred, and have satisfied the knowledge

requirement. Citi Hedge's motion to dismiss the claims for aiding and abetting fraud and breach of fiduciary duty should be denied.

The result is the same under BVI law. (Bompas Dec., ¶¶ 147-69.) Citi Hedge argues (at 23) that the concept of "aiding and abetting" is confined to criminal liability, but this is merely semantics. Plaintiffs' allegations establish the equivalent claims under BVI law for liability "as a joint tortfeasor with a principal fraudster" (*id*. ¶ 147) and "knowing assistance in a breach of trust." (*Id*. ¶ 163.) Citi Hedge further argues (at 23) that Plaintiffs' allegations are insufficient to establish the requisite dishonesty on the part of Citi Hedge for these claims. While Plaintiffs do not use the label "dishonesty," that is not necessary; their allegations that Citi Hedge knew of the fiduciary duties owed by the Kingate Defendants and of the breaches of those duties, and assisted with such breaches, are sufficient to establish dishonesty for these claims. (*Id*. ¶ 169.)

E. Plaintiffs Have Stated a Claim for Third-Party Beneficiary Breach of Contract.

Citi Hedge contends (at 24-25) that Plaintiffs' third party beneficiary claims should be dismissed because the administration agreements select BVI law, which does not recognize such claims. To the contrary, given New York's predominant interest in the litigation, New York law should determine Plaintiffs' status as third party beneficiaries. *See* Cons. Mem. § II-B. In *Anwar II*, the court applied New York law to determine whether plaintiffs were third party beneficiaries of contracts between the funds and their managers, even though the contracts selected Bermuda law, because there was nothing in the complaint alleging that plaintiffs were given actual notice of the choice of law provision in the contract. *Anwar II*, 2010 WL 3341636, at *32. Furthermore, the court observed that the law of the selected forum would not recognize Plaintiffs as third party beneficiaries, and that choice of law clauses "are not valid if, among other circumstances, enforcement would deprive the complaining party of his day in court or of

an effective remedy." *Id.* As in *Anwar II*, New York law should apply here, because there is no allegation that Plaintiffs here were given actual notice of the choice of law provisions, and they would likewise be denied their day in court if BVI law were to be applied.[15]

Under New York law, to assert rights under a contract, a non-party must show that (1) a valid contract existed, (2) it was intended for the third party's benefit, and (3) that benefit was sufficiently immediate, rather than incidental. *See Madeira v. Affordable Hous. Found., Inc.*, 469 F.3d 219, 251-52 (2d Cir. 2006). Citi Hedge focuses its challenge (at 25 n.14) on only the second element under New York law – whether the contract was intended for the Plaintiffs' benefit. However, "[d]etermining intent is necessarily a factual endeavor," and thus, "third-party beneficiary status is a question of fact." *Debary v. Harrah's Operating Co., Inc.*, 465 F. Supp. 2d 250, 261 (S.D.N.Y. 2006). Hence, where there is any ambiguity in the contractual language, courts typically refuse – even on summary judgment motions – to decide the issue of whether the contract intended to confer third-party beneficiary status. *See, e.g., Barry v. Atkinson*, No. 96 CIV. 8436, 1998 WL 255431, at *3 (S.D.N.Y. May 19, 1998) (finding agreement ambiguous as to the rights of alleged third-party beneficiaries due to "the absence of any language in the agreement affirmatively bestowing such a right").

The administration agreement evinces an intent to benefit Plaintiffs. It has an entire section, Section 4.4, entitled "Shareholder Services," which lists the services that Citi Hedge is to provide directly to Plaintiffs, such as processing their subscription and redemption requests (AA § 4.4.1); handling all correspondence with them (*id.* § 4.4.4); and sending them circulars, notices of meetings, reports, and financial statements (*id.* § 4.4.2). (CAC ¶¶ 46, 197, 377.) In addition,

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[15] *See also P.T. Adimitra Rayapratama v. Bankers Trust Co.*, 1995 WL 495634, *4-5 (S.D.N.Y. 1995) (applying New York law to determine whether defendant was a third party beneficiary of a contract, notwithstanding the contract's selection of English law).

in recognition of the important role Citi Hedge played in protecting investor interests, the Funds' information memoranda assured investors that the administrator determines the net asset value of the Funds' portfolio and "verifies the prices attributed to the securities held by the USD shares of the Fund by reference to pricing sources independent of the Investment Advisor whenever reasonably possible." (*Id.* ¶ 187.) The subscription agreement also provides that Citi Hedge would be available to investors before investing to answer questions or verify information in the Information Memorandum. (Euro Sub. Ag. at S-9; Global Sub. Ag. at S-9.) There is no one else but the investors who would benefit from these services.

These provisions preclude dismissal. Where "the terms of the contract necessarily require the promisor to confer a benefit upon a third person, then the contract contemplates a benefit to that third person, and this is ordinarily sufficient to justify third-party-beneficiary enforcement of the contract, even though the contract also works to the advantage of the immediate parties thereto." 22 N.Y. Jur.2d Contracts § 304; *see also Subaru Distribs. Corp. v. Subaru of Am., Inc.*, 425 F.3d 119, 124 (2d Cir. 2005) ("[A] contractual requirement that the promisor render performance directly to the third party shows an intent to benefit the third party."); *Anwar II*, 2010 WL 3341636, at *43 (holding that shareholders were properly alleged to be intended beneficiaries of fund administration agreement where agreement did not explicitly name them as third party beneficiaries, but did require the administrator to render certain performance directly to the plaintiffs).[16]

[16] *See also Flickinger v. Harold C. Brown & Co., Inc.*, 947 F.2d 595, 597, 600 (2d Cir. 1991) ("[w]here performance is to be rendered directly to a third party under the terms of an agreement, that party must be considered an intended beneficiary," in the context of a brokerage firm that was retained to provide clearing services for a broker's clients, and registered securities for plaintiff, shipped securities to plaintiff, and sent periodic activity statements to plaintiff); *Finch, Pruyn & Co. v. M. Wilson Control Servs.*, 658 N.Y.S.2d 496, 497-98 (App. Div. 3d Dep't 1997) (plaintiff manufacturer who hired an electrician to perform services at the plaintiff's power plant was a third-party beneficiary to a subcontract between electrician and mason, because "subcontract necessarily required [mason] to directly perform

Citi Hedge submits (at 25 n.14) that the agreements' inurement and non-assignment clauses preclude Plaintiffs' third-party beneficiary claims, but Citi Hedge does not even identify the clauses in the contract. The agreement does contain a non-assignment clause (AA § 17), but not an inurement clause.[17] Even if there were an inurement clause, it would not bar Plaintiffs' claim because the contract also evinces a contrary intent to benefit Plaintiffs, both through the provisions discussed above and the third-party indemnification clause (AA § 10.5). *See Anwar II*, 2010 WL 3341636, at *43 (refusing to dismiss third-party beneficiary claims against fund administrator where contract contained both an inurement and a non-assignment clause, where other provisions evinced an intent to benefit the shareholders); *De Lage Landen Fin. Servs. v. Rasa Floors, LP*, No. 08-0533, 2009 WL 884114, at *8-9 (E.D. Pa. Apr. 1, 2009) (applying New York law) (declining to dismiss third-party beneficiary claims where the agreements at issue contained a non-assignment clause and an inurement clause, where they also provided indemnification by the contracting parties in case of third-party claims). The presence of such "conflicting evidence" necessitates that the court have the "benefit of discovery and development of the factual record to aid in construing the contracts and discerning the parties' intent." *De Lage*, 2009 WL 884114, at *8-9. The decision *Stephenson v. Citco*, 09 Civ. 00716, 2010 WL 1244007 (S.D.N.Y. Mar. 31, 2010), cited by Citi Hedge, is not to the contrary, because – unlike

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services at plaintiff's facility . . . in order to satisfy . . . obligations to plaintiff."); *Richards v. City of New York*, 433 F. Supp. 2d 404, 430 (S.D.N.Y. 2006) (children were third-party beneficiaries of a contract between the Administration for Children's Services and an agency licensing the children's foster care providers because "they are the people for whom the delegated services are to be provided").

[17] Non-assignment clauses alone are not sufficient to foreclose third-party beneficiary status, because "it is possible for parties to intend that a third party enjoy enforceable rights while at the same time intending to limit or preclude assignments." *Piccoli A/S v. Calvin Klein Jeanswear Co.*, 19 F. Supp. 2d 157, 164 (S.D.N.Y. 1998). *See also Woolard v. JLG Indus.*, 210 F.3d 1158, 1170 (10th Cir. 2000) ("Although the assignment of a contract will confer rights and obligations upon a third-party, the assignment is unrelated to one's status as a third-party beneficiary. The non-assignment clause serves to protect . . . successors from . . . unauthorized transfer of rights and obligations and does not speak to the intended third-party beneficiary status . . .").

here – the court held that nothing in the four corners of the agreement expressed an intent to benefit third parties. *See Anwar II*, 2010 WL 3341636, at *43 (distinguishing *Stephenson* on this basis). Accordingly, Plaintiffs' third-party beneficiary claim should not be dismissed.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Citi Hedge's motion to dismiss filed by the Citco Defendants, or in the alternative, allow Plaintiffs to amend the Complaint to cure any pleading deficiencies.

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Respectfully submitted,

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